DRN-4950627

The complaint

Mr S, trading as an enterprise I will refer to as B, complains about the settlement of his business interruption insurance claim, made as a result of the COVID-19 pandemic, by Royal & Sun Alliance Insurance Limited trading as RSA.

What happened

The following is intended only as a brief summary of events. Additionally, whilst other parties have been involved, for the sake of simplicity I have largely just referred to B and RSA.

B operates as a wedding venue and accommodation provider. It held a Holiday Cottage Owners insurance policy underwritten by RSA. The policy covered a number of risks, including losses from business interruption. In 2020, B was significantly impacted by the government-imposed restrictions introduced as a result of the COVID-19 pandemic. And it claimed for the resulting losses under the policy.

RSA ultimately accepted that there was a valid claim under the policy starting in March 2020. And paid B up to the limit for a single claim, £250,000. B considered that its business had been interrupted by the pandemic on more than one occasion though, and said that further claims should be considered – each subject to their own financial limit.

As RSA did not alter its position, B brought its complaint to the Financial Ombudsman Service. Our Investigator thought the complaint should be upheld. He recommended that RSA consider the situation on the basis that there had been additional claim events starting in late September 2020 and early November 2020.

RSA disagreed. I have gone into more detail on the reasons for this below. As our Investigator was unable to resolve this complaint, it has been passed to me for a decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I am upholding this complaint. I'll explain why.

The issues that relate to this complaint have been discussed, to an extent, in a number of court cases. As well as *The Financial Conduct Authority & Ors v Arch Insurance (UK) Ltd & Ors* [2021] UKSC 1 ("the FCA test case"), of particular relevance are the courts' judgments in *Stonegate Pub Company Limited v MS Amlin Corporate Member Limited & Others* [2022] EWHC 2548 (Comm) ("Stonegate"), *Greggs Plc v Zurich Insurance Plc* [2022] EWHC 2545 (Comm) ("Greggs"), *Various Eateries Trading Limited v Allianz Insurance Plc* [2022] EWHC 2549 (Comm) ("Various Eateries") and its appeal, and what I'll refer to as *Hollywood Bowl Group plc v Liberty Mutual Insurance Europe SE* [2024] EWHC 124 (Comm) ("Hollywood Bowl").

The parties are aware of these judgments and have made submissions relating to them. As

a result, I don't consider it is necessary to go into all of the various issues covered by these judgments – even where they are relevant to the claims being considered as part of this complaint.

Similarly, whilst both parties have made detailed submissions both in terms of the law and other circumstances, I am not going to discuss each of these within this decision. Instead, I am going to focus on what I consider to be the key issues.

In many ways, both parties are actually in agreement. There is no dispute that B's business was interrupted, or that this interruption falls under the cover provided by the following clause within B's policy:

> "Loss as a result of
>
> A) closure or restrictions placed on the Premises as a result of a notifiable human disease manifesting itself at the Premises or within a radius of 25 miles of the Premises."

The dispute is over whether there was only one interruption caused by the imposition of restrictions or more. This is potentially significant, as the clause limits coverage to £250,000 per claim. And for a maximum of 12 months for any claim.

The majority of B's revenue is generated in relation to the weddings it hosts, with most accommodation income coming from these events. So, I have focussed this decision on the issue of whether B's wedding business was interrupted on more than one occasion.

RSA is correct in that there were restrictions placed on B's premises throughout the 12-month period from March 2020. However, I do not consider that this would automatically mean there was only one interruption.

The policy which was considered in the Stonegate judgment was different to B's policy. However, the "Prevention of Access peril" within that judgment had enough similarity with the clause above that I consider it is appropriate to think about the findings in that part of the judgment. The judge essentially said that there were as many claims possible as there had been materially different restrictions imposed on the policyholder. So, the question becomes, how many times were materially different restrictions placed on B's premises?

B's pre-pandemic business model was to only cater for weddings of at least 50 persons. So, RSA considers that some of the changes in restrictions were not materially different as they relate to B. For example, RSA say that the restrictions introduced in late September 2020, reducing attendees from 30 to 15 people, would not have impacted B – as its business model was that it did not provide weddings for either 30 or 15 people, and so would have remained interrupted since March 2020. Essentially, RSA is relying on what was referred to in Hollywood Bowl as there being a continuum of closure throughout this whole period.

Whilst I appreciate RSA's stance here, I am not overly persuaded by it. In some circumstances RSA's position here might be understandable. For example, if a restaurant previously catering for in-house dining only decided to provide a take-away service during the pandemic, this would be a "new business" and an interruption of that new business would be unlikely to fall into the cover provided by the policy.

However, I don't think changing the number of required attendees at a wedding would constitute B changing its business. It was insured to carry out the business of providing weddings, not the business of providing weddings to a minimum of 50 people. That limitation does not appear to have been part of the consideration of the insured risk (albeit a maximum number of guests might be). And it seems that B did alter its position and that it did provide

some weddings during this period – meaning there was not a continuum of closure.

I should also point out that a policyholder will be required to mitigate its insured losses. Had a wedding provider with a previous minimum guest requirement not adjusted this policy, an insurer might be entitled to argue that the policyholder had not made reasonable adjustments to mitigate its losses.

Ultimately, I consider that whenever there were "negative" changes to the restrictions that were materially different in terms of B's ability to provide weddings, there was a potential new claim event.

To clarify, by "negative" I mean a change which increased the impact on B. For example, a change prior to September 2020 reduced the impact on B by moving the restriction from being on all weddings to those of 30 people or less. This did not interrupt B's business, but rather allowed it to take place to an extent. So, this would not be considered a new claim event.

Additionally, I say "potential" claim events, as it would still remain for B to satisfy the other requirements of cover – for example that its business was actually interrupted/that a loss was caused by these restrictions, and that there had been a manifestation of COVID-19 within 25 miles of the premises. It may well be straightforward to demonstrate these requirements, but it is not for me to do so as part of this decision.

B has indicated that the reference in the Stonegate judgment to the restrictions being materially different will apply to changes concerning the type of activity permitted. For example a change from restrictions on capacity and receptions to one where there is a national lockdown is a materially different restriction. However, I don't agree this is necessarily the case. I consider there is a materially different restriction where the impact of the "regulation" is materially different. A change from a situation where a business is unable to provide weddings or receptions due to tier restrictions to one where it is unable to provide weddings or receptions due to a national lockdown, is not a materially different restriction. The name and legal source of the restriction may be different. But the impact on the business is not. Such a situation would fall under description of a continuum of closure.

B has also indicated that in addition to the claim commencing in March 2020, it should be covered for three further claims. It has said the first should start from 4 July 2020. However, the changes introduced at this point would be a reduction in the restrictions introduced in March 2020. So, I do not consider this would be the start of a new claim event. Rather it remains part of the previous claim indemnity period.

Our Investigator identified the changes on 28 September 2020 and 5 November 2020 as being occasions when more onerous restrictions were placed on B's premises, and so these would be potential new claim events. I agree with these.

B has said that the introduction of the tier restrictions in mid-October 2020 also caused an interruption to B's business. However, B's premises appear to fall within a tier one area, so it does not seem that more onerous restrictions would have resulted from the tier system. I will also add that if B's business was caught by these tier restrictions, there may not have been any change caused by the 5 November 2020 move to the national lockdown. I.e. there may then have been a "continuum of closure" from mid-October through November 2020.

These restrictions were then reduced in early December 2020. I don't however consider this would be the end of this claim period. A reduction in the restrictions does not mean that there are no longer restrictions placed on the premises. And I consider this claim period could potentially last until new, more onerous restrictions were placed on the premises. This

was likely to be 31 December 2020 when the area containing B's premises moved to tier three.

This change would have taken place after the end of this policy period though, so B would be unable to claim under this policy for losses caused by the introduction of restrictions on or after 31 December 2020.

Whilst the maximum indemnity period is 12 months, it would only be possible for B to claim for losses proximately caused by the restrictions introduced within the period of insurance. B has said that the restrictions introduced on 3 December 2020 continued until at least April 2021. However, from 31 December 2020, any interruption to B's business was most likely proximately caused by restrictions introduced outside of the policy period. The move to tier three on this date resulted in more onerous restrictions being placed on B's premises than leading up to this date. And this would mark the end of the indemnity period relating to the impact of previous restrictions.

As I say, it will be for B to evidence its claims appropriately. But, based on the information available to me, it would seem that B has a valid claim for each of the periods:

- 20 March 2020 to 27 September 2020
- 28 September 2020 to 4 November 2020, and
- 5 November 2020 to 30 December 2020.

As I understand it, RSA has indemnified B for its losses for a single 12-month period from March 2020 to February 2021. Whilst RSA has capped this settlement at £250,000, it may be that even removing this financial limit, there is little or no further settlement is due to B. However, this will have to be determined by RSA reassessing the claims on the basis of the above periods.

Putting things right

Royal & Sun Alliance Insurance Limited trading as RSA should put things right by reassessing B's claim on the basis that it potentially suffered new claim events whenever more onerous, materially different restrictions were placed on B's premises that impacted its ability to provide weddings (or accommodation) of any size.

My final decision

My final decision is that I uphold this complaint. Royal & Sun Alliance Insurance Limited trading as RSA should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 30 December 2024.

Sam Thomas
Ombudsman